
IN THE IOWA SUPREME COURT

APPELLATE NUMBER 15-0011

BERNARD J. WIHLM AND
PATRICIA M. BALEK

PLAINTIFFS-APPELLEES,

v.

SHIRLEY A. CAMPBELL, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JOHN JOSEPH WIHLM AND AS TRUSTEE OF THE JOHN JOSEPH WIHLM REVOCABLE TRUST DATED APRIL 2, 2012 AND PARTIES IN POSSESSION,

DEFENDANT-APPELLANT.

APPEAL FROM THE IOWA DISTRICT COURT
OF CERRO GORDO COUNTY CASE NO. EQCV068660
AND FRANKLIN COUNTY CASE NO. EQCV501145
THE HONORABLE DEDRA L. SCHROEDER

APPLICATION FOR FURTHER REVIEW OF SEPTEMBER 14, 2016 DECISION OF THE IOWA COURT OF APPEALS

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I. QUESTIONS PRESENTED

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2. **WHETHER THE COURT OF APPEALS ERRED BY APPLYING LAW THAT IS INAPPLICABLE IN THE STATE OF IOWA.**

3. **WHETHER THE COURT OF APPEALS ERRED WHEN DISREGARDING THE TRIAL COURT'S FINDINGS OF CREDIBILITY OF ALL THREE EXPERTS, AND RELIED SOLELY UPON THE EXPERT TESTIMONY OF ONE EXPERT.**

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Crouch v. Nat'l livestock Remedy Co., 231 N.W. 323 (Iowa 1930).

V. STATEMENT SUPPORTING FURTHER REVIEW

As evidenced by Newhall v. Roll, pending before the Iowa Supreme Court as Case No. 14-1622, the law governing the partition of real estate as set forth in Iowa Rules of Civil Procedure 1.1201(2) and Spies v. Prybil is being applied by Iowa courts in manners inconsistent with applicable law. Newhall v. Roll, 14-622, 2015 WL 5965205 (Iowa Ct. App. Oct. 14, 2015) (further review granted Jan. 19, 2016). Not only is the application of law by our Court of Appeals inconsistent with the decisions of the trial courts, the Court of Appeals' analysis relies upon law which the Iowa Supreme Court has held is no longer applicable.

Further, to reach its conclusion in this case, the Court of Appeals did not decide whether a particular appraisal on a particular date regarding particular real estate in a particular economy was reliable.

Rather, the Court of Appeals, relying upon inapplicable law, determined the reliability of appraisals generally, an issue which was not properly presented to the Court of Appeals.

The application of the presumption in favor of partitioning real estate by sale has wide-spread impact.

The recent cases of the Court of Appeals, in which it reversed decisions of the trial court, have raised numerous issues which the Supreme Court should settle.

Accordingly, further review should be granted pursuant to Iowa Rule of Appellate Procedure 6.1103(1)(b)(1), (2), (3), and (4).

VI. STATEMENT OF THE CASE

January 31, 2014, Plaintiffs Bernard J. Wihlm ("Wihlm") and Patricia M. Balek ("Balek") filed their Petition for Partition of Real Estate by Sale in Cerro Gordo County Case No. EQCV068660 and Franklin County Case No. EQCV501145. Appx. pp. 1-9, 10-13.

The Petitions sought the partition by sale of four parcels of real estate, two of which are located in Cerro Gordo County, Iowa, and two of which are located in Franklin County, Iowa.

Shirley A. Campbell ("Campbell") filed her Answer to Petition for Partition of Real Estate by Sale in Cerro Gordo County Case No. EQCV068660 on March 12, 2014. Appx. p. 14. Campbell filed her Answer in Franklin County Case No. EQCV501145 on March 31, 2014.

In seeking partition in kind, Campbell requested that the trial court award to her three parcels of real estate described and depicted in Exhibits 107 and 108, including:

i. The south sixty acre parcel in Cerro Gordo County (also shown in Exhibits 11 and 25, at Appx. pp. 308, 324);

ii. The acreage which is part of the north 160 acres in Cerro Gordo County (Appx. p. 307); and

iii. 14.06+/- acres located east of the acreage, the boundary of which has never been established and cannot be depicted.

Appx. pp. 77-79, 309, 234.

A bench trial occurred before the Honorable District Court Judge DeDra L. Schroeder on September 24, 2014, (the "Trial").

At Trial, Wihlm and Balek maintained that given a number of economic factors, the fair market value of the real estate could not be ascertained and consequentially a partition in kind was inequitable and impracticable.

Campbell advanced arguments that appraised values of the real estate could be relied upon by the trial court to determine a partition in kind was both equitable and practicable.

The trial court entered Findings of Facts and Conclusions of Law on November 7, 2014 (the "Decree"), ordering a partition by sale at public auction. Appx. pp. 24, 32.

In the Decree, the trial court specifically noted that each of the three experts who testified at trial, Vernon F. Greder, Jr. ("Greder"), an appraiser, Cory Behr ("Behr"), an auctioneer, and Reed B. Kuper ("Kuper"), a licensed real estate broker,

were impressively credentialed and "extremely knowledgeable and experienced" and "creditable and helpful." Appx. p. 28.

The trial court, for numerous reasons set forth below, determined that the particular appraisals presented to it and relied upon by Campbell in furtherance of her arguments of a partition in kind, could not be relied upon.

Specifically, the trial court noted Kuper's testimony that the July 2014 appraised values were not indicative of the value of the property at the time of trial. Appx. p. 26-27. The trial court also referenced to Behr's testimony that a partition in kind is not possible "in this situation due to the volatile land prices, the decrease in the crop prices, and the wide varying CSR2 values between the parcels." Appx. pp. 26-27.

The trial court further referenced Greder, who offered the appraisals upon which Campbell and the Court of Appeals relied in advancing the argument favoring a partition in kind, and noted Greder's acknowledgement that "the market is (sic) a whole is a lot less predictable than in years past." Appx. p. 27.

Reinforcing the trial court's inability to partition the real estate in kind in an equitable and practicable fashion, the trial court stated "the fact remains, and the court so finds, the determination of the various parcels' values due to the volatility of the market, and the reasons set forth herein, would be like taking a shot in the dark." Appx. p. 28.

The trial court relied upon the following factors contributing to such conclusion:

i. Various soil qualities;

ii. A water way;

iii. Various types of soil;

iv. Some parcels are poorer quality than others, which would be more adversely affected by market fluctuation than higher quality real estate;

v. Decrease in grain prices; and

vi. The size of Franklin County parcels being too small thus, limiting ability to sell.

Appx. p. 28.

Thus, the trial court concluded that "the true market value of the land will be ascertained through a sale on the free market." Appx. p. 30.

Campbell appealed, and the appeal was submitted to the Court of Appeals.

The Court of Appeals decided the Appeal on September 14, 2016, reversing the district court and remanding the case. (See addendum).

Wihlm and Balek now seek further review.

VII. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN HOLDING THAT CAMPBELL DID NOT PROVE A PARTITION IN KIND WOULD BE EQUITABLE AND PRACTICABLE.

The standard for purposes of determining whether real estate should be partitioned in kind or by sale was first, and perhaps most, thoroughly analyzed by the Iowa Supreme Court in 1968. Spies v. Prybil, 160 N.W.2d 505 (Iowa 1968).

Iowa Rule of Civil Procedure 1.1201(2) states "property shall be partitioned by sale and division of the proceeds unless

a party prays for a partition in kind by its division into parcels, and shows that a partition is equitable and practicable." Iowa R. Civ. P. 1.1201(2) (emphasis added).

The current statutory law resulted from 1943 statutory change deviating from prior common law and applicable statutes in other jurisdictions, which remain binding authority in other jurisdictions.

Noting the change in applicable law, the Spies Court stated "the rule already referred to is unequivocal in favoring partition by sale and in placing upon the objecting party the burden show why this should not be done in the particular case." Spies, 160 N.W.2d at 508. Thus, and as noted by the trial court herein, the burden shifted to Campbell who sought a partition in kind rather than a partition by sale.

The trial court's findings that Campbell failed to prove a partition in kind would be both equitable and practicable, as required by Iowa Rule of Civil Procedure 1.1201(2), was well founded in both fact and law.

Campbell relied solely upon the appraisal of Greder to advance the argument that the partition in kind would be equitable and practicable.

Addressing first the reliability of the appraisal, the trial court appropriately determined that relying upon the appraisal, would constitute "mere guess work." Appx. p. 29.

The trial court's decision was supported by a number of facts at trial.

First, the trial court, relying upon Kuper, noted that the agricultural real estate market is "volatile" and there was a significant downward trend in grain prices. Appx p. 26.

The trial court, relying upon what it referred to as Kuper's "well-reasoned analysis" also concluded that the downward trend in grain prices was a "significant factor contributing to the value someone may pay for the agricultural real estate." Appx. p. 26.

The variation in soil types throughout the Cerro Gordo County real estate also contributed to the trial court's rejection of the appraisal. Appx. p. 26.

Further, and not addressed by the Court of Appeals, was the trial court's notation that CSR ratings had been replaced with more accurate, up-to-date CSR2 ratings. Appx. pp. 26-27.

The trial court noted that notwithstanding the application of more accurate, up-to-date CSR2 values (rather than CSR values), Greder's appraisal relied upon the older version (CSR values), which did not accurately address or determine the quality of real estate.

Also supporting the trial court's decision that the appraisal was unreliable was Behr's opinion that a partition in kind was not possible "in this situation" due to the volatile land prices, the decrease in crop prices, and the widely varying CSR2 values between the parcels. Appx. p. 27.

The trial court's reliance upon Behr cannot be overlooked, as it found Behr to be so credible that it ultimately appointed Behr as referee to oversee and carry out the partition by sale. Appx. p. 32.

However, it was not just the experts of Wihlm and Balek which set forth factors substantiating the trial court's decision that Campbell's sole evidence, an appraisal, was insufficient to meet her burden.

Even the opinion of Campbell's own expert, Greder, supported the trial court's finding that reliance upon an appraisal given the market would be "mere guess work."

Greder, who supplied the appraisals upon which the Court of Appeals relied in reversing the trial court, conceded "the market is (sic) a whole is a lot less predictable than in years past." Appx. p. 27.

Thus, the evidence at trial, whether from the experts of Wihlm and Balek, or Campbell, all support the trial court's finding that a partition in kind was neither practicable nor equitable.

Notwithstanding the numerous facts noted by the trial court that supported its decision that the appraisal advanced by Campbell was unreliable, the Court of Appeals disregarded

such findings, and stated that Greder's appraisal was "absolutely more certain than mere speculation." Slip Op. 7.

However, the Court of Appeals did not address the other evidence which the trial court determined was both helpful and well-reasoned, including:

i. Greder's failure to use CSR2 values;

ii. The poorer quality parcels being more adversely affected by market fluctuations (this is significant considering Campbell would be awarded the uncontroverted better quality real estate, which would be impacted less than the real estate allocated by the Court of Appeals to Wihlm and Balek);

iii. The size of the Franklin County real estate, and its impact on the salability of such property.

Also absent in the Court of Appeals' Decision was the testimony from Campbell herself, which further supports the trial court's decision that the appraisal relied upon by her, and by the Court of Appeals, was unreliable.

During the cross-examination of Campbell, the following exchange ensued:

Q. Your concern is that at auction, somebody's going to bid more than you; correct?

A. Yes. They'll run it up.

Q. Run it up more than the appraised value?

A. Yes. Because about three miles north of us, it went for 14--Behr sold some property for 14.

Q. $14,000 an acre?

A. That was in the Globe Gazette.

Appx. pp. 430-31.

Thus, each of the three experts and Campbell herself supported the trial court's decision that the appraisal relied upon by Campbell was insufficient to meet her burden that a partition in kind was both equitable and practicable. Iowa R. Civ. P. 1.1201; Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968).

In reversing the trial court's decision that Campbell failed to meet her burden, the Court of Appeals failed to address the

adequate protection afforded Campbell that a partition by sale would provide while also ensuring the protection of those who desire partition by sale. Campbell could buy those parcels desired by her at the sale.

Rather, the Court of Appeals reached a conclusion that partition by sale would deprive Campbell of the opportunity to retain a "multi-generation farm."

Yet, Behr, who the trial court appointed as referee and consequentially would have control over how the property was sold, testified that if property were to be sold at auction, "all members of the public, including parties to the litigation could bid." Appx. pp. 397-98 (Tr. pp. 143-44).

Behr also testified that with respect to the Cerro Gordo County real estate, the south 60 acre parcel, which is desired by Campbell (Exhibit 107) should be sold separate from the balance of the Cerro Gordo County real estate, allowing Campbell to acquire the parcels desired by her. Appx. p. 405 (Tr. p. 155).

Thus, if partitioned by sale, the interest of all parties would be adequately protected, including the interests of Wihlm and Balek to ensure the fair market value of the real estate is realized, while also affording Campbell the opportunity to avoid losing the multigenerational farm, a proposition for which the Court of Appeals expressed concern.

Finally, in its decision finding that the trial court erred, the Court of Appeals misapprehended evidence relating to the inadequate inequities of Campbell's proposal.

In its Decision, the Court of Appeals stated "according to Wihlm and Balek, Campbell's property may be worth $36,000.00 more than their shares if sold." Slip Op. 8.

The $36,000.00 figure to which the Court of Appeals made reference was derived from a table found at page 49 of Wihlm and Balek's Final Brief and the conclusion that "Campbell would receive an asset of $36,300.00 higher value than each of her siblings." Appellees' Brief at pp. 49-50.

As noted in the table, the calculation stated therein were conservative in nature and for explanatory purposes only. Appellees' Brief at pp. 49-50.

The $36,000.00 considered only the 4.5% conservative reduction in value of the real estate to be acquired by Wihlm and Balek under Campbell's proposal, but did not consider the increase in value of Campbell's real estate as reflected in Table Two of the brief of Wihlm and Balek. Appellees' Brief at pp. 49-50.

If the Court of Appeals also considered the second half of the equation, (that is, Table Two), which was also offered solely for exemplary purposes, the disparity of the assets to be set off to Campbell, as compared to those to be set off to each of Wihlm and Balek, is in excess of $126,000.00. Appellees' Brief at pp. 57-8.

Thus, the Court of Appeals' decision, in which it relied solely on one-half of an equation, overlooked the second half of the equation.

Examples misapprehended by the Court of Appeals were offered by Wihlm and Balek to reinforce the finding of the trial court that a partition in kind would be inequitable to Wihlm and Balek.

In the event Campbell's appraisals did not assign the highest and best price to the real estate she would allocate to herself, Wihlm and Balek would experience inequities. Iowa Courts have acknowledged that a party to a partition is entitled to the highest and best price available. Varnell v. Lee, 14 N.W.2d 708 (Iowa 1944). A partition by sale would ensure that this legal authority is upheld.

Not only must Campbell prove that a partition in kind is equitable.

Campbell must also prove that a partition in kind is practicable. Iowa R. Civ. P. 1.1201(2).

In its Decision, the Court of Appeals references Iowa Rule of Civil Procedure 1.1201(3) which provides "when partition can be conveniently made of part of the premises but not all,

one portion may be partitioned and the other sold." Slip Op. 8 (citation omitted).

The Court of Appeals further states that two of the experts testified the properties can and should be sold in separate parcels, and concludes that Behr suggested a partition in kind is appropriate. Slip Op. 9.

Behr did opine that, with respect to the Cerro Gordo County real estate, the south 60 acre parcel, which is desired by Campbell, should be sold separate from the balance of the Cerro Gordo County real estate. Appx. p. 405 (Tr. p. 155).

However, he never opined that Campbell should be awarded 14.06+/- acres of the north 160 acres in Cerro Gordo County, as desired by her.

There is a stark contrast between selling two separate parcels, which already have separate legal descriptions, something Behr did recommend, and carving off an indeterminable amount from the north 160 acre Cerro Gordo county parcel, something that Behr never recommended to the trial court as suggested by the Court of Appeals.

To suggest that a 160 acre parcel, which already has a legal description unto itself, and the adjacent 60 acre parcel immediately to the south can be sold separately is not the same as suggesting that removing 14.06+/- acres from the north 160 acre parcel is practicable or equitable.

Behr's opinion was limited to only splitting the two Cerro Gordo County farms at sale.

A recommendation that the north 160 acre parcel could be sold separately from the south 60 acre parcel is not supportive of a conclusion that a partition in kind as proposed by Campbell, and more specifically awarding her 14.06+/- acres of the north 160 acre parcel is practical or convenient.

Absent from the record and the Court of Appeals' Decision are other relevant, practical facts, including:

i. The need for a survey;

ii. Who would incur the costs for the survey;

iii. The possible need for a driveway installation;

iv. The installation of fencing;

v. Who would be responsible for the cost of installing the fence;

vi. The precise acres to be set off to Campbell, and whether those acres are more or less than "14.06" as her request to the Court was "14.06+/- acres."

All of these factors are relevant to and must be addressed before one can conclude that the proposal of Campbell is convenient and practicable.

No evidence addressing such factors was presented by Campbell, who carries the burden pursuant to Iowa Rule of Civil Procedure 1.1201(2). The trial court appropriately concluded that Campbell failed to meet this burden.

2. THE COURT OF APPEALS APPLIED LAW INAPPLICABLE IN THE STATE OF IOWA.

As appropriately noted by the trial court in its decision, when a party seeks a partition in kind instead of by sale, the burden shifts to the party desiring the in-kind partition. Spies v. Prybil, 160 N.W.2d 505, 507 (Iowa 1968); Iowa R. Civ. P. 1.1201(2).

When citing the prior rule of Iowa, whether by common law or by statute, the Spies Court cited 68 C.J.S. Partition section 125 which notes "the feasibility of partition in kind is presumed and the burden of showing the existence of a sufficient ground for a sale is on those asking a sale." Id.

However, Supreme Court in Spies acknowledged the distinction of Iowa law in comparison to that of other states and the common law, noting that other applicable standards, including the law stated in the C.J.S. sections, are "no longer true in Iowa." Id.

Notwithstanding the Iowa Supreme Court's rejection of common law or the law of other jurisdictions, as replaced by the Iowa Rules of Civil Procedure favoring the partition by sale, the Iowa Court of Appeals relied upon out-dated and inapplicable law in support of its decision that the real estate that is the subject of this dispute should be partitioned in kind.

The Court of Appeals wrote "while Campbell does not farm the property, all else being equal, the sentimental

attachment to the property weighs in favor of dividing her interest in kind." Slip Op. 8.

In support of such assertion, the Court of Appeals cites 68 C.J.S. Partition § 123.

However, the premises therein were based not upon the current law of Iowa, but upon inapplicable law of other jurisdictions, which favor partition in kind.

In fact, Iowa stands alone as the only state requiring a party seeking a partition in kind to carry the burden that said partition would be equitable and practicable. 59A Am.Jur.2d § 119 at 96 (2015).

Thus, when the Iowa Supreme Court in Spies stated "the rule already referred to is unequivocal in favoring partition by sale," it steadfastly held that all else is not equal.

Accordingly, the law relied upon by the Iowa Court of Appeals in determining that "all else being equal, the sentimental attachment [Campbell] may have to the property weighs in favor of dividing her interest in kind" is premised upon law no longer the standard in Iowa.

Because the Court of Appeals relied upon inapplicable law to overturn the trial court, it committed reversible error.

3. THE COURT OF APPEALS ERRED IN DISREGARDING THE TRIAL COURT'S FINDINGS OF CREDIBILITY OF ALL THREE EXPERTS.

In its Decision and when addressing the aforementioned reliance upon appraisals generally, the Court of Appeals noted the credentials of Greder, stating "Greder was a certified appraiser with extensive experience in the area." Slip Op. 7.

Yet, when referencing the testimony of Behr and Kuper, the Court of Appeals noted that each is "not a certified appraiser." Slip Op. 6.

Thus, when comparing to the Court of Appeals' analysis of the credentials of Greder, as compared to those of Behr and Kuper, the Court of Appeals appears to suggest that Behr and Kuper lack requisite qualifications.

However, the trial court gave each expert witness the credibility due him and decreed "this Court was impressed by the work done by each of the experts as well as the expert's

credentials. All the experts who testified were extremely knowledgeable and experienced, and the court found their testimony to be credible and helpful." Appx. p. 28.

While this equitable proceeding is subject to *de novo* review, an appellate court under such standard of review is to give deference to the credibility findings of the fact-finder. Iowa R. App. P. 6.904(3)(g) (reaffirming that "in equity cases, especially when considering the credibility of witnesses, the court gives weight to the findings of fact of the district court" is so well-settled, no authority needs to be cited for support); In re Estate of Johnson, 739 N.W.2d 493, 496 (Iowa 1997) (stating on an appeal, the appellate court gives deference to the factual findings of the district court).

This is because the district court or the fact-finder has "the opportunity to assess the credibility of the witnesses." Hensler v. City of Davenport, 790 N.W.2d 569, 578 (Iowa 2010).

Notwithstanding such standards, the Court of Appeals did not afford the trial court's findings the requisite deference

that "all the experts that testified were extremely knowledgeable and experienced . . . and credible and helpful." Appx. p. 28.

By discrediting the credentials or qualifications of Behr and Kuper, the Court of Appeals essentially disregarded the facts relied upon by the trial court of all three experts in determining that one appraisal (Greder's) was unreliable and speculative.

The Supreme Court in Crouch v. National Livestock Remedy Co., upheld a jury instruction of the trial court in which it advised the fact finder that the law does not require the fact finder to "surrender [its] judgment to that of any person testifying as an expert witness." Crouch v. Nat'l Livestock Remedy Co., 231 N.W. 323 (Iowa 1930). The Crouch Court further held that a conclusion of a fact finder should be reached "from the consideration of a whole of the evidence, including the opinions and testimony of the experts, and also the substantive facts." Id. at 324.

The significance of the Court of Appeals disregarding the trial court's findings of credibility of the other experts is perhaps most exemplified by the trial court's appointment of Behr to serve as referee.

Clearly, the trial court did not question the credibility or reliability of Behr. If it questioned his analysis, it would not have appointed Behr to carry out its Order.

Notwithstanding such appointment, the Court of Appeals ignored the numerous opinions of Behr (and Kuper), and instead focused on the credentials of only one expert, and the conclusion reached by him.

Such analysis is contrary to well settled law, and is reversible error.

4. THE COURT OF APPEALS ERRED IN DECIDING AN ISSUE THAT DETERMINED THE OUTCOME OF THE CASE, ALTHOUGH SUCH ISSUE WAS NOT PRESENTED TO IT.

In its Decision, the Court of Appeals noted "the disposition of this case turns largely on the testimony of three

expert witnesses and whether or not appraising farm land is so speculative that partition in-kind becomes impracticable." Slip Op. 5.

Thus, the Court of Appeals sought to decide whether or the act of appraising real estate, generally, is probative and reliable.

However, the issue of the reliability of appraisals generally was not presented to the trial court, nor did it opine on such issue.

This misapplication of the issues is further indicated by notation of the Court of Appeals that it disagrees "with the conclusion that appraisal of farm land, generally, is merely a speculative endeavor." Slip Op. 7 (emphasis added). The Court of Appeals further held "we see no reason to reject the concept of appraisal, generally." Slip Op. 7.

An appellate court will decide only those issues appropriately presented to and decided by the lower court. City of Postville v. Upper Explorerland Regional Planning Commission, 834 N.W.2d 1, 8 (Iowa 2013) (citations omitted).

The issue before the trial court was not whether the appraisal of farm land, generally, was too speculative of an endeavor to rely upon appraisals.

Rather, the issue presented to the trial court was whether or not Campbell proved that a partition in kind was equitable and practicable.

The trial court held that the particular appraisal upon which she relied did not satisfy such burden for a number of reasons, including:

i. Volatilely of the agricultural real estate (Appx. p. 26);

ii. Downward trend in grain prices (Appx. p. 26);

iii. Variation in soil types (Appx. p. 26);

iv. Varying CSR2 values (Appx. p. 27);

v. The less predictable nature of the real estate market as a whole (Appx. p. 27);

vi. The inconsistent decline in real estate values between lesser quality real estate and better quality real estate (Appx. pp. 27-28);

vii. An appraisal utilizing outdated data (CSR values rather than CSR2 values) (Appx. p. 28);

viii. The size of the real estate parcels (Appx. p. 28).

The trial court did not go so far as to determine that appraisals, generally, are unreliable.

If a factfinder is to disregard facts which render an appraisal regarding a particular parcel of real estate in a particular real estate market irrelevant (as suggested by the Court of Appeals' Decision), a factfinder would have no opportunity to consider all facts presented, rendering only one fact determinative.

If the Court of Appeals' decision is upheld, the issue it decided would prohibit a party from ever challenging the validity of an appraisal, regardless of other facts or considerations to which a fact finder should give consideration.

This is contrary to well settled and applicable law. Crouch v. Nat'l Livestock Remedy Co., 231 N.W 323 (Iowa 1930) (holding that a fact finder should reach a conclusion

based upon "consideration a whole of the evidence, including the opinions and testimony of the experts, and also the substantive facts.").

Yet, the Court of Appeals focused on only one fact, rather than the numerous factors to which the trial court gave consideration, and consequently erred in its Decision.

CONCLUSION

Wihlm and Balek respectfully request that this Court grant their application for further review, and upon further review, vacate the Decision of the Court of Appeals and affirm the Decree of the district court.

CERTIFICATES OF COST, SERVICE, AND COMPLIANCE

CERTIFICATE OF COST

The undersigned attorney for Plaintiffs-Appellees certifies that the amount actually paid for printing and duplicating the necessary copies of this Application in final form was **$0.00.**

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs-Appellees certifies that on the date referenced below, he filed this Application for Further Review with the Clerk of the Supreme Court by EDMS and also served two (2) copies of this Application for Further Review on counsel for the Defendant-Appellant:

Michael G. Byrne
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CERTIFICATE OF COMPLIANCE

1. This Application complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because

this Application for Further Review contains 5,026 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.1103(4).

2. This Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Application for Further Review has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14 point Bookman Old Style font.

Submitted and served this 4th day of October, 2016.

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